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In The
Supreme Court of The United States
October Term 1996

VEMCO, INC., a Michigan corporation,
Petitioner,

v.

FEDERAL INSURANCE COMPANY,
a New Jersey corporation,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED FOR REVIEW

Whether a construction surety's written agreement to submit an existing controversy to arbitration is valid, irrevocable, and enforceable under the Federal Arbitration Act, notwithstanding the surety's prior unsuccessful objection to court-ordered arbitration.

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In support of its Petition for a Writ of Certiorari (the "Petition" or "Pet."), Vemco, Inc. ("Vemco") replies to Federal Insurance Company's Brief in Opposition to the Petition as follows:

A. There Are No Factual Issues to Be Resolved by The Court in this Case

In an attempt to defeat Vemco's Petition, the Respondent, Federal Insurance Company ("Federal"), has tried to color the question presented by Vemco's Petition as one laden with factual issues that must be resolved by the Court. To the contrary, there are no issues of fact to be resolved by the Court in this case.

1. Any Ambiguities as to the Meaning of the Agreement to Arbitrate and to Be Bound by Arbitration and/or Federal's Underlying Intentions Pertaining to the Agreement Are Issues of Law Which Must Be

Resolved in Favor of Arbitration

The uncontroverted record in this case demonstrates that, after the District Court ordered Federal to arbitration and after two months of negotiations and the exchange of numerous letters on the subject, see Pet. at Appdx. G, Federal signed a document in which it agreed to arbitrate and to be bound by arbitration ("Agreement"):

> Please be advised that Federal Insurance Company has agreed to participate in and be bound by the above arbitration proceedings both as to surety issues and non-surety issues.

See Pet. at Appdx. G-63.[1]

Federal does not dispute this fact. It merely claims that the Agreement does not

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[1]Contrary to Federal's argument, Vemco does not seek to hold Federal liable based on "a series of letters between lawyers," but only on one letter -- Federal's Agreement -- The other letters were discussed in the Petition only to show the Court that Federal's Agreement was no "slip of the tongue," but the result of negotiations between the parties.

mean what the District Court[2] concluded it means and that the meaning of the document is a question of fact. Federal's argument is simply wrong. The interpretation of the Agreement is an issue of law, not one of fact.

As Vemco's Petition discusses in detail, any ambiguity in the meaning and scope of an agreement to arbitrate must, as a matter of law, be resolved in favor of arbitration. See Pet. at 21-25. Moreover, even ambiguities as to a party's intention in entering into an arbitration agreement must, as a matter of law, be generously construed in favor of arbitrability. See Pet. at 23. Importantly, Federal has not challenged either of these principles of law.

Based on these principles and the record before this Court, as well as the Court of Appeals, the meaning of the Agreement is, as a matter of law, what the District Court held it is: an Agreement which, by its very terms, binds Federal to

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[2]Moreover, contrary to Federal's assertion, the District Court did make a factual determination that Federal had agreed to be bound by arbitration. See Pet. at Appdx. E-34.

the arbitration results.

2. There Are No Ambiguities in the Record Which Could Give Rise to An Issue of Fact[3]

Federal has attempted to inject ambiguity into the record by putting at issue its intent in entering the Agreement. Federal should not be allowed to interject its arguments on intent at this eleventh hour because Federal never made them earlier in the case.[4]

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[3]Federal's Brief goes a great length in attempting to create the illusion that there are numerous issues of fact buried in this Petition. For example, Federal spends one whole page of its eleven-page brief explaining how Vemco's description of the District Court Order mandating arbitration is incorrect because, like Flakt, Federal was also ordered to arbitrate. However, whether or not the District Court ordered Federal to arbitrate is not even an issue in this case because Vemco has conceded that to be the case for purposes of the Petition. See Pet. at 8 n.2. The issue in this case is whether Federal's subsequent Agreement to arbitrate is valid and enforceable.

[4]Federal's arguments on intent were neither made before the District Court nor the Court of Appeals. See Pet. at Appdx. E-36 [District Court Order Confirming Arbitration Award] ("...Federal agreed to be bound by the arbitration. Federal has presented no reason why it should not be so bound.") (citation omitted); Pet. at 17 n.5 (Vemco's discussion of Federal's arguments on appeal, which has not been disputed by Federal).

Even if the Court were to entertain Federal's arguments on intent, those arguments should fail because they do not raise issues of fact or ambiguities in light of the undisputed evidence in the case. Indeed, even without reference to the record, Federal's arguments must be rejected because they defy logic even when viewed in isolation from the record.

The only hard facts on the record relating to the issue of intent are that Vemco and Federal negotiated Federal's Agreement for two months, Vemco told Federal that it would make Federal a defendant in the District Court lawsuit unless Federal agreed to arbitrate and to be bound by the arbitration as to surety and non-surety issues,[5] and Federal ultimately signed an Agreement to that effect.

Having "fought the good fight" on the issue of arbitrability, Federal elected the course best suited to a speedy and final resolution of its liability: Arbitration.

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[5]Contrary to Federal's allegation, Vemco never named Federal as a Defendant in the District Court lawsuit. Federal's role in that lawsuit always was that of a third party plaintiff.

Having lost the arbitration, Federal now argues that all it intended to do throughout the two months of negotiations between the parties and in finally entering the Agreement was to appease Vemco's concern about the lack of an arbitration clause in the Bond. This argument boggles the mind. Federal would have this Court believe that it signed a document with language as sweeping as that which is contained in the Agreement at issue out of sheer benevolence for Vemco. Not only is such a position inconceivable, given that the parties were opponents in a lawsuit, but is also unsupported by one iota of evidence in the record.

Federal further claims that it signed the Agreement because its rights were not affected by it -- Federal's theory being that its position would have been the same whether or not a party to the arbitration and whether or not a party to the Agreement binding it to the arbitration results.[6] This assertion is

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[6]Needless to say, because no rational party would enter into an agreement believed to be detrimental to its own interest gratuitously or just to appease its opponent, Federal must now argue that the Agreement was not detrimental to its own interest in order to bolster the credibility of its prior argument. However, the Agreement was detrimental to Federal's

preposterous. As a surety, Federal had available special surety defenses, such as invalidity or unenforceabiliy of the Bond, which would not have been addressed in an arbitration between Vemco and Flakt. Thus, had Vemco not obtained an Agreement to arbitrate and to be bound by arbitration from Federal, Vemco would have been forced to bring a lawsuit on the Bond in the District Court, where issues specific to the Bond and unrelated to Flakt's principal liability would have had to be resolved. Therefore, there is simply no objective basis in the record to support Federal's position.

Lastly, Federal argues that its Agreement to arbitrate and to be bound by arbitration could not have meant what the Agreement's plain language provides because, if Federal had agreed to that, it would have been increasing its exposure by jeopardizing its right to indemnification from Flakt. That argument should be ignored for two reasons. First, Federal's interpretation of

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interest, as anyone reading the broad verbiage of the Agreement would be remiss not to conclude ("...Federal Insurance Company has agreed to participate in and be bound by the above arbitration proceedings both as to surety issues and non-surety issues.")

its indemnification agreement with Flakt is unsubstantiated by any evidence in the record since the indemnification agreement is not a part of it. Secondly, even if it were true that Federal did not anticipate all of the legal repercussions of its Agreement to arbitrate and to be bound by arbitration at the time it signed the Agreement, Federal has never cited any law which would relieve Federal from its obligations under the Agreement on this basis.[7]

In sum, the record is uncontroverted that Federal signed a negotiated Agreement which sweepingly commits Federal to arbitrate all issues in the case and to be bound by arbitration without any reservation whatsoever. The undisputed evidence in the case renders the record unambiguous with respect to the meaning of this Agreement and/or Federal's intent. Furthermore, even if the record were ambiguous with respect to either of those two issues, all ambiguities must, as

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[7]Federal argues that neither the letters nor the Agreement spell out that Federal was waiving its right to appeal the arbitration or that Federal would be bound by the arbitration award even if the same was vacated as to Flakt. However, there is nothing ambiguous or tricky about the words "bound by the above arbitration." "Bound" means "bound."

a matter of law, be interpreted in favor of arbitration. Accordingly, and contrary to Federal's argument, this Petition is devoid of any questions of fact to be resolved by the Court.

B. The Court of Appeals' Refusal to Enforce Federal's Uncontroverted Arbitration Agreement Does Contravene the Federal Arbitration Act, Federal Policy, and Precedent from this Court

As Vemco's Petition makes clear, the Court of Appeals had, based on the record before it and substantial precedent from this Court interpreting the Federal Arbitration Act, an absolute obligation to interpret Federal's Agreement in favor of arbitration. See Pet. at 21-25, 27-28.

The Court of Appeals avoided the enforcement of this binding Agreement by concluding that Federal had done nothing more than obey the District Court Order mandating Federal to arbitrate. See Pet. at 13-14. This conclusion is not only erroneous as a matter of law, see Pet. at 19-21, but contradicts the clear mandate of the Federal

Arbitration Act that agreements to arbitrate ongoing disputes be valid, irrevocable, and enforceable, as well as the federal policy favoring the enforcement of arbitration agreements which has been repeatedly announced by this Court.

CONCLUSION

Based on the foregoing, Vemco believes that the Petition richly merits the Court's attention and respectfully requests that it be granted.

Respectfully submitted,

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